

Before the  
**FEDERAL COMMUNICATIONS COMMISSION**  
Washington, D.C. 20054

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

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In the Matter of )  
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Petition for Declaratory Ruling to )  
Declare Unlawful Certain RFP )  
Practices by Ameritech )  
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\_\_\_\_\_ )

CC Docket No. 98-62

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**COMMENTS OF**  
**MCLEOD USA, INCORPORATED,**  
**FOCAL COMMUNICATIONS CORPORATION**  
**ICG COMMUNICATIONS, INC., AND KMC TELECOM, INC.**

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Dated: June 4, 1998

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## SUMMARY

Sprint requests that the Commission review and declare unlawful the arrangement proposed by Ameritech in its RFP by which Ameritech would market in its region the long distance service of a selected long distance provider in return for unspecified compensation. Since the Sprint filing, this RFP appears to have ripened into the Ameritech/Qwest Alliance announced recently whereby Ameritech is marketing Qwest long distance services to Ameritech's local exchange customers.

The RFP and the resulting Ameritech/Qwest Alliance represent a transparent effort by Ameritech to enter into the interLATA business without first meeting the obligation to open its local exchange market to competition. As the Commission is well aware, Ameritech has failed to receive authority to provide interLATA service within its region under Section 271 of the Telecommunications Act of 1996. It is only when Ameritech has satisfied all of the requirements of the 1996 Act competition checklist that it may provide in-region long distance service. To permit Ameritech to do indirectly through this arrangement what it is prohibited from doing by the Act would eviscerate the core of the balance Congress sought to construct in the 1996 Act.

Given the demonstrated reluctance of the RBOCs to open their local exchange markets to competition, even with the prize of long distance service as an incentive, there can be no doubt that the local exchange markets will not be opened to competition if through sleight of hand the RBOCs are allowed to award themselves the benefits of single source marketing. The Commission must make it absolutely clear to the RBOCs that their intransigence will not be rewarded.

The proposed marketing RFP and the Ameritech/Qwest Alliance clearly violate the 1996 Act. The Commission should declare these arrangements illegal and order Ameritech to immediately cease and desist from its activities under the Alliance.

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McLeod USA, Incorporated ("McLeod"), Focal Communications Corporation ("Focal"), ICG Communications, Inc. ("ICG"), and KMC Telecom, Inc. ("KMC"), by their undersigned counsel and pursuant to the Federal Communications Commission's ("Commission's") May 5, 1998 Public Notice, hereby submit these Comments on Sprint's Petition for Declaratory Ruling in the above-referenced proceeding. McLeod, Focal, ICG and KMC are providers of local exchange and interLATA telecommunications services, as well as other telecommunications and non-telecommunications services. As such, McLeod, Focal, ICG and KMC have an interest in assuring that the Commission prevent Ameritech from entering the interLATA market until Ameritech has opened its monopoly local exchange markets to competition pursuant to Section 271. Because Ameritech has not opened its monopoly local exchange markets, its Request for Proposal ("RFP") and the Alliance entered into pursuant to that RFP violate the restrictions of Section 271 and the

equal access and nondiscrimination obligations of Section 251(g) of the Communications Act and the Telecommunications Act of 1996. Accordingly, McLeod, Focal, ICG and KMC have an interest in the Commission's ruling on Sprint's Petition in this proceeding and therefore file these comments to urge the Commission to grant Sprint's Petition and declare Ameritech's practices, as outlined in the RFP attached to Sprint's Petition, illegal and to order Ameritech to cease and desist from such practices.

### INTRODUCTION

In this proceeding, the Commission was asked to consider whether certain conduct by Ameritech, outlined in an RFP, would violate the interLATA restrictions of section 271 and the equal access and nondiscrimination obligations of Section 251(g) of the Communications Act.<sup>1</sup> Ameritech has a monopoly over local telephone service in major portions of five States.<sup>2</sup> In various parts of those five States, as well as in other parts of the country, McLeod, Focal, ICG and KMC provide quality local exchange and interLATA services to customers. McLeod, Focal, ICG and KMC desire to compete with Ameritech's local exchange services in its monopoly service areas. To date, Ameritech has failed to open its local exchange monopoly markets to competitors.

Subsequent to the filing of Sprint's Petition and apparently pursuant to the RFP, Ameritech began implementing an Alliance with Qwest Communications International, Inc. ("Qwest"), whereby Ameritech endorses and markets Qwest's long distance service to its monopoly customer base as part of a combined package with Ameritech's monopoly local service. In return, Qwest pays

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<sup>1</sup> Petition at 1.

<sup>2</sup> Illinois, Indiana, Wisconsin, Michigan, and Ohio.

Ameritech an undisclosed amount for each customer Ameritech signs up for this package.<sup>3</sup> The arrangement proposed in the Ameritech RFP, and apparently implemented with Qwest, violates the Communications Act and stifles the chance of developing competition among local providers. Such competition is essential to ensure high quality, low cost local phone services to customers. Thus, McLeod, Focal, ICG and KMC urge the Commission to grant Sprint's Petition and declare Ameritech's proposals and its activities unlawful. Further, McLeod, Focal, ICG and KMC request the Commission to declare unlawful Ameritech's specific arrangement with Qwest implementing the activities outlined in the RFP.

### **DISCUSSION**

Under the Ameritech/Qwest Alliance, Ameritech is being paid to endorse Qwest's long distance service, to urge new or existing monopoly local customers to use or switch to Qwest from competing long distance services, and to offer Qwest's long distance service as part of a package with Ameritech's monopoly service.

#### **I. The Purpose of the Communications Act of 1996, to Open Local Monopoly Markets to Competition, Is Thwarted by Ameritech's Proposals and Actions**

If permitted to proceed, the arrangement between Ameritech and Qwest will cause substantial and irreparable harm to carriers seeking to enter the local market (like McLeod, Focal, ICG, and KMC), and to the public interest as defined in the Telecommunications Act of 1996 ("1996 Act"). With passage of the 1996 Act, Congress fashioned a "pro-competitive, de-regulatory national policy

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<sup>3</sup> Ameritech's and Qwest's alliance has given rise to a lawsuit, similarly alleging violation of the interLATA restriction of section 271 and the equal access and nondiscrimination obligations of section 251(g) of the Communications Act, currently pending as Case No. 98 C 2993 in the United States District Court for the Northern District of Illinois.

framework” with the primary goal of “opening all telecommunications markets to competition.” S. Conf. Rep. No. 104-230, 104<sup>th</sup> Cong., 2d Sess. 1 (1996). Congress recognized that effective competition in local telephone exchange markets could not emerge unless incumbent BOCs permitted potential competitors to gain access to the bottleneck local networks. Congress thus obligated the BOCs, like Ameritech, to provide their competitors with nondiscriminatory interconnection with the local network, nondiscriminatory access to unbundled network elements, and the opportunity to purchase telecommunications services at wholesale rates for resale to end users. 47 U.S.C. § 251(c)(2)-(4). At the same time, the 1996 Act replaced the restrictions of the MFJ<sup>4</sup> with new provisions that, inter alia, allow the BOCs to enter the long distance market once they have met certain conditions, after applying for and receiving the approval of the Commission. See 47 U.S.C. 271. The ability to enter interLATA markets was intended to serve as a “carrot” to encourage the BOCs to expedite the opening of their monopoly local networks. The “stick” is the requirement that they may only offer a long distance service after those conditions are satisfied. The

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<sup>4</sup> In the United States’ antitrust suit which culminated in the MFJ, the focus was upon the BOC’s impeding of long distance competition by denying their long distance competitors access to the essential facilities that they controlled and to information about those facilities at the same terms and price that the Bell System’s long distance operation enjoyed. The BOCs’ simultaneous provision of local and long distance service was perceived as inherently anticompetitive – increasing the costs of and irreparably harming competing carriers. It was argued that the engineering and operation of local networks were so complex and dynamic, and so dependent on subjective judgments of the persons who manage them, that anticompetitive abuses of local monopolies could never be adequately remedied, much less deterred, by after-the-fact antitrust remedies if a BOC had a direct financial stake in any long distance carrier, and that the combination of a BOC’s local monopolies and competitive long distance service would, in all events, cause competitors to incur costs of monitoring BOC behavior that the BOCs’ long distance arm would not incur. The United States contended that the bottleneck local monopolies of the BOCs must be divested from AT&T, and these divested BOCs must be prohibited from participating in those competitive markets so long as their local exchanges remained monopolies.

1996 Act also expressly retained the BOCs' obligation to comply with the equal access and nondiscrimination requirements in place before the 1996 Act's passage. See 47 U.S.C. § 251(g).

Congress recognized that if a BOC entered the long distance market and it was the only carrier that could jointly offer local and long distance service in a single package, the BOC would monopolize the long distance business of the substantial number of customers who want to engage in "one stop shopping" and obtain local and long distance jointly. McLeod, Focal, ICG and KMC offer interLATA services in competition with Qwest and have entered the local markets currently monopolized by Ameritech. As noted below, Ameritech's proposals and actions, which constitute the provision of long distance service, violate the terms of the 1996 Act. The 1996 Act is designed to allow customers access to providers such as McLeod, Focal, ICG and KMC without the virtually insurmountable barriers to effective competition which Ameritech has erected in its alliance with Qwest.

## **II     Ameritech Has Not Complied With Section 271's Competitive Checklist, Setting Forth Strict Criteria for Local Access**

Section 271 codifies the core of the MFJ's interexchange restriction, while simultaneously authorizing specific services that had been barred by the MFJ's terms and the judicial decisions under it.<sup>5</sup> Section 271 also sets forth the standards and procedures that will govern any request to

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<sup>5</sup>     First, Section 271(a) provides that a BOC may not "provide interLATA services except as provided in this section." Second, Section 271 establishes three sets of express statutory exceptions to that general restriction. Section 271(b)(2) authorizes a BOC to provide interLATA services originating outside the states in the BOC's region, thereby overruling United States v. Western Electric Co., 673 F. Supp. 525, 543-45 (D.D.C. 1987). Sections 271(b)(3) and (g) authorize specified "incidental" interLATA services within a BOC's region -- e.g., long distance services that are provided to cellular customers or are used to access information services or transport network signaling (overruling id. at 550-52; United States v. Western Electric Co., 907 F.2d 30 (D.C. Cir. 1990); id., 969 F.2d 1231 (D.C. Cir. 1992)). Further, Section 271(f) authorizes those services for

remove the remaining core of the long distance restriction as it applies to any particular BOC in a particular State. Such removal is conditioned on the BOC making a showing to the FCC that it has satisfied statutory requirements in that state. In particular, Ameritech may not begin to provide general in-region interLATA services in any state unless and until the FCC finds that Ameritech: (1) has implemented a 14-point "competitive checklist" of measures that assure that new entrants can effectively offer competing local services (Sections 271 (c)(2)(A) & (B)); (2) faces a facilities-based local service competitor that is offering local service to customers in that state (or finds that all potential such providers have failed to request or timely to implement interconnection with Ameritech) (Section 271(c)(1)); (3) would comport with the separate affiliate and nondiscrimination requirements of Section 272 (Section 271(b)(1) & (d)); and (4) through its long distance authority would not subvert "the public interest" (Section 271(d)(3)).

Ameritech has only sought this authorization from the FCC for one state, Michigan. The FCC soundly rejected that application, finding that Ameritech had failed to develop the interfaces critical to providing nondiscriminatory access to certain network elements, had not provided other competing local exchange carriers adequate interconnection to its own monopoly network, and had not provided the nondiscriminatory access to life-saving 911 services that is required by section 271. Ameritech has not taken the steps that are required by Section 251 and by the competitive checklist to open its markets to competition, and it therefore retains monopoly control of the local exchange market. For these reasons, the long distance restrictions of Section 271(a) continue to apply to Ameritech.

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which the MFJ interexchange restriction had been waived by the Court as of the date the Act was signed into law.

The fact that no RBOC has yet met the competitive checklist requirements by opening its local exchange to competition strongly suggests that even with the carrot and stick approach in the 1996 Act, RBOCs are unwilling to permit the development of competition in their monopoly markets. This attitude is underscored by the recent 15 page decision of the Texas Public Utility Commission laying out the steps SWBT would have to take in order for that Commission to report to the FCC that SWBT had fulfilled the requirements of the checklist. Indicative of the concern and difficulties associated with opening the monopoly local exchange market is the Texas Commission's view that the evidence developed in its 271 proceeding indicated that SWBT needs to change its corporate attitude before it will be able to meet the requirements of the checklist. This attitude is confirmed in the recent remarks of Solomon Trujillo, the President of US WEST, who has asserted that "[a] lot of us Bells are frustrated" by the need to meet a "cumbersome" checklist.<sup>6</sup>

The FCC, however, has explicitly stated that the competitive checklist is critical to opening local markets to competition and that it therefore must be fully implemented before a RBOC can offer in-region, interLATA service.<sup>7</sup> As noted above, Ameritech has not received authority to provide interLATA services to customers in any of the states in its region. Ameritech has unquestionably failed to open its local markets and is prohibited from providing interLATA services

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<sup>6</sup> John J. Keller and Stephanie N. Mehta, U.S. WEST Strikes Marketing Alliance With Qwest in Bold Move Skirting Rules, The Wall Street Journal, p. A2 (May 7, 1998).

<sup>7</sup> See In the Matter of Application of Ameritech Michigan Pursuant to Section 271 of the Communications Act of 1934, as amended, to Provide In-region, InterLATA Services in Michigan, CC Docket No. 97-137, Memorandum Opinion and Order, FCC 97-298 (Aug. 19, 1997) ("Ameritech Michigan Order").

to customers in each of its States. The Ameritech/Qwest Alliance is thus a thinly veiled attempt to do indirectly what Ameritech is prohibited from doing directly.

The Ameritech/Qwest Alliance will delay or thwart the local entry of McLeod, Focal, ICG, KMC and other carriers who want to compete with Ameritech's local service, pursuant to Sections 251-53 of the Communications Act. The Ameritech/Qwest Alliance allows Ameritech to profit from long distance services without meeting the requirement of Section 271 and thus diminishes or eliminates any incentive to open its local monopoly. The Alliance will thus, at best, postpone the effective entry of McLeod, Focal, ICG, KMC and others and to force them to incur litigation and other costs to pressure Ameritech to comply with the requirements of Sections 251-53. This result is contrary to the intent of the 1996 Act.

## **II     Ameritech's Proposals and Actions Constitute the Provision of Long Distance Services in Violation of Section 271**

### **A.     Ameritech's Marketing is Prohibited**

The marketing of Qwest's long distance service both constitutes the unlawful "provision" of long distance service by Ameritech and a violation of the separate equal access and nondiscrimination requirements. Industry analysts have therefore aptly described US WEST's (and, by analogy, Ameritech's) posture as "Stop us if you can." See "US WEST Deal Called Test Of '96 Law," Washington Post, p. D3 (May 8, 1998).

The MFJ court squarely held that any arrangement in which a BOC marketed the service of select interexchange carriers in competition with other interexchange carriers violated the MFJ's restriction against "provid[ing]" interexchange services. See United States v. Western Elec. Co., 552 F. Supp. 131, 227 (D.D.C. 1982) (Section II(D)(1)). Moreover, although the marketing alone

renders the alliances with Qwest unlawful, Ameritech has further aggravated the illegality of that arrangement by also abandoning its neutrality in its description of long distance carriers to its local customers and instead endorsing and promoting Qwest's services over those of other long distance carriers. Ameritech, in allowing Qwest to participate in service arrangements that Ameritech denied to other competing long distance carriers, is assuming a role prohibited under the MFJ of "arbiter of future interLATA services, . . . shap[ing] interLATA competition to suit its needs." United States v. Western Elec. Co., 583 F. Supp. 1257, 1259 (D.D.C. 1984).

It could not be clearer that Section 271(a), which prohibits any BOC from "provid[ing] interLATA services except as provided in this section" (47 U.S.C. § 271(a)), continues all of the interLATA prohibitions of the MFJ except where the Act itself (or a subsequent FCC order under § 271) permits BOCs to offer interLATA services. Congress used exactly the same word -- "provide" -- that the MFJ court construed and found so central to its decree and subsequent orders. Further, while Congress enacted express exceptions for out-of-region services, incidental services, and previously authorized services -- and thereby overruled a series of earlier judicial decisions under the MFJ -- Congress created no exception for marketing. Further, the legislative history confirms that Section 271 would prohibit all of the activities prohibited by the MFJ, unless the statute permitted them.<sup>8</sup>

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<sup>8</sup> Thus, the Conference Report describes the effect of Section 271 as follows:

New section 271(b)(1) requires a BOC to obtain Commission authorization prior to offering interLATA services within its region unless those services are previously authorized, as defined in new section 271(f), or "incidental" to the provision of another service, as defined in new section 271(g).

B. Ameritech's Financial Incentives Are Improper

The MFJ barred any arrangement in which a BOC had a financial stake in the success of an individual long distance carrier, for the whole point of the ban on a BOC's provision of interexchange services was to assure the BOCs had no "incentive" to favor a particular interexchange carrier and to disadvantage its rivals. See United States v. Western Elec. Co., 552 F. Supp. 131, 160-65 (D.D.C. 1982), aff'd, 460 U.S. 1001 (1983). An arrangement in which Ameritech markets Qwest's long distance service in exchange for a payment for each customer that Ameritech signs up epitomizes the relationships that create this illicit incentive and that thus constitutes the unlawful "provi[sion]" of long distance services.

IV. The Ameritech/Qwest Alliance Independently Violates Section 251(g)

Section 251(g) codifies the "equal access" requirements of pre-existing consent decrees, including the MFJ, "until such restrictions and obligations are explicitly superseded by regulations prescribed by the [FCC]." 47 U.S.C. § 251(g). The FCC has not yet adopted or even proposed any such regulations, and therefore, as the FCC has noted, "any equal access requirements pertaining to 'teaming' activities that were imposed by the MFJ remain in effect until the BOC receives section 271 authorization." Non-Accounting Safeguards, 11 FCC Rcd. at 22047.

The MFJ's equal access provisions strictly require, among other things, that statements BOCs make to local customers about long distance service ensure equal treatment among long distance carriers. See, e.g., United States v. Western Elec. Co., 578 F. Supp. 668, 676-77 (D.D.C. 1983). The FCC has reiterated that those requirements mandate "nondiscriminatory treatment" of long distance

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H. Conf. Rep. 104-458, at 147 (emphasis added).

carriers. Non-Accounting Safeguards, 11 FCC Rcd. at 22046. They specifically require, for example, that BOC sales representatives receiving calls from customers to sign up for service provide those customers with the names "of all of the carriers offering interexchange services in [the BOC's] service area" in "random order." Id.

The arrangement between Ameritech and Qwest constitutes classic discrimination and "unequal access," and that is precisely why Qwest is willing to pay substantially for it. Qwest has not joined with Ameritech because its sales representatives have any special marketing talents -- when you work for a monopoly, there is very little occasion to develop such expertise. Instead, Qwest is paying for preferential access to Ameritech's monopoly assets: (1) the ability to bundle its long distance service with monopoly local service and thus be the only long distance carrier to offer one-stop shopping on a region-wide basis; (2) the distribution channels and customer information Ameritech controls as a result of the fact that all residents and businesses in their area must contact them for local service; and (3) the corporate endorsement of the monopoly local provider.<sup>9</sup> Equal access means equal treatment -- not an equal right to pay for favored treatment. Ameritech has created a situation in which some carriers, if they are willing to pay for it, are "more equal than others." If Ameritech is allowed to profit in this way because it is a monopoly provider of local services, it will never have sufficient incentive to open up its local markets and thereby lose its financial advantage from those monopolies.

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<sup>9</sup> Indeed, by asserting that any offering that they market must be equal or lower in price to Qwest's and Ameritech's are implicitly declaring that higher-priced services are not offering sufficiently greater value to justify the difference. But the whole point of equal access was to ensure that customers would decide on a long distance carrier based on price, quality, and any other attribute that is important to them, without the BOC placing its thumb on the scale.

**V. Local Competition is Impermissibly Stifled by the Ameritech/Qwest Alliance**

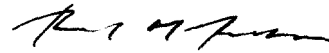
Because the Ameritech/Qwest Alliance allows Ameritech to profit from the long distance business *without* opening its local markets to competition, it will, unless enjoined, irreparably harm McLeod, Focal, ICG, and KMC, as well as other carriers, who are seeking effectively to compete with Ameritech's local monopolies, as well as substantially undermine a central objective of the Communications Act. The "cumbersome" checklist of Section 271, as it was dubbed by Solomon Trujillo, the President of US WEST, however, contains the core market-opening requirements that an RBOC must meet before it is permitted to offer in-region, interLATA services. See 47 U.S.C. § 271(c)(2)(B). Plainly, the Ameritech joint marketing alliance is an effort to leverage the value of its local exchange monopoly into the long distance market while evading the fundamental market-opening requirements of the 1996 Act. Moreover, if Ameritech is permitted the benefits of in-region, interLATA entry without being required to open its local markets to competition, it will lose all incentive to open those markets in the future. It will be able to retain its local monopoly while reaping the benefits of its long distance marketing efforts, and competition in both long distance and local markets will be harmed.

**CONCLUSION**

McLeod, Focal, ICG and KMC support Sprint's Petition and suggest that Ameritech's proposed conduct described in the RFP violates the Communications Act and should be enjoined. Further, Ameritech's implementation of its RFP, through its alliance with Qwest, is similarly violative of the Communications Act. For the foregoing reasons, McLeod, Focal, ICG and KMC

respectfully request that the Commission grant the relief requested in Sprint's Petition, and grant the further relief of declaring the specific Alliance between Ameritech and Qwest to be unlawful.

Respectfully submitted,



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Dated: June 4, 1998

## CERTIFICATE OF SERVICE

I, Anne Bottini Beste, do hereby certify that on this 4<sup>th</sup> day of June, 1998, copies of the foregoing "Comments of McLeod USA, Incorporated, Focal Communications Corporation ICG Communications, Inc., and KMC Telecom, Inc." were hand delivered to the following parties:

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